



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
MISCELLENEOUS NO. 2 OF 2015
OMULELE & TOLLO ADVOCATES.....APPLICANT/RESPONDENT
VERSUS
MOUNT HOLDINGS LIMITED.....RESPONDENT/APPLICANT

RULING

1. By a Notice of Motion dated 16th August 2016 made under Sections 3, 3A and 80 of the Civil Procedure Act, Orders 45 and 53 of the Civil Procedure Rules, Fair Administrative Act No.4 of 2015, Articles 23, 47, 159 and 165 of the Constitution of Kenya, the applicant seeks orders that:-

- a. The Honourable Court be pleased to certify this application as urgent and heard on priority basis.
- b. The Honourable Court be pleased to suspend/stay of taxation of Bill of Costs dated 25th September 2014 scheduled to be heard on 19th August 2016 pending hearing and determination of this application inter-partes.
- c. The Honourable Court be pleased to strike out the Bill of Costs dated 25th September 2014 filed by the firm of Omulele & Tollo Advocates, Applicant/Respondent on account of work done by the purported firm of Omulele & Co. Advocates.
- d. The Honourable Court do declare that the firm of Omulele & Company Advocates had no legal capacity in terms of Registration of Business Names Act, Cap 499 Laws of Kenya to trade as such for lack of registration of the same.
- e. Costs be provided for and paid by Christopher Omulele in person.

2. The application is based on the grounds on the face of the application and the affidavit of Ashok L Doshi sworn on 16th August 2016.

Briefly, it is the applicants contention that the applicant/respondent was carrying on his business in the name and style of M/s Omulele & Co. Advocates which name was not registered as a business name under Business Names Act, Cap 499 Laws of Kenya, hence was not a legal entity capable of contracting and enforcing anything in its name or through any other entity.

3. The applicant/respondent filed grounds of opposition dated 18th October 2016 in which they oppose the application and contend that the application is a disguised appeal against the judgment delivered in Civil Appeal No.74 of 2015, No 75 of 2015 and No.76 of 2015 involving the same parties and which was delivered on 27th May 2016 and which allowed the appeal against a ruling barring the taxation of the

applicant/respondent's Bill of Costs. It is further contended that the court is functus officio with regard to the orders sought, the matter having been previously dealt with by the court. According to the applicant/respondent, the application is misconceived bad in law, belated and an abuse of the court process.

4. The advocates on record filed written submissions. The applicant submits that in Kenya, every entrepreneur is required by law to register the business name he/she wishes to carry out his/her business activities. That the name Omulele & Co. Advocates was not registered as a business name under the Registration of Business Names Act, Cap 499 Laws of Kenya and therefore was never a legal entity capable of contracting and enforcing anything in its name or through any other entity. It was further submitted that the application is not a disguised appeal as the appeal was on the basis of a retainer and not on capacity.

5. The respondent submitted that the present application mirrors the applicant's Notice of Motion dated 12th February 2015 which sought the same prayers as in this application. That both applications intended to have the respondent's Bill of Costs dismissed or struck out. The respondent submitted that the application dated 12th February 2015 was heard and determined by this Honourable Court and a ruling on it given on 16th September 2015. Being dissatisfied with that ruling, the respondent preferred an appeal which was decided by the Court of Appeal in the respondent's favour vide its judgment delivered on 27th May 2016. It was therefore the respondent's submission that the present application is re judicata for the reason that the issues that were canvassed in that previous application are directly and substantially the same issues that are contained in the present application. The respondent referred the court to the some case law, namely:

i) NAIROBI ELC NO.1271 OF 2014 LILIAN NJERI MURAYA & ANOTHER –VS- VIRGINIA NYAMBURA NDIBA & ANOTHER

ii) C.A NO.80 OF 1988 POP-IN (KENYA)LTD & 3 OTHERS –VS- HABIB BANK AG ZURICH

iii) NAIROBI HCCC NO.723 OF 2012 NJERU NYAGA & CO ADVOCATES –VS- GEORGE NGURE KARIUKI

6. I have considered all the issues raised in the application and the rival submissions. In its application dated 12th February 2015, the applicant was seeking orders that:

a. This application be certified as urgent and heard ex-parte first on priority basis.

b. There be stay of taxation of the applicant's Bill of Costs scheduled for hearing on 13th January 2015 until further orders of this Honourable Court.

c. The Honourable Judge do give directions and determine whether retainer existed between the firm of Omulele & Tollo Advocates and make appropriate orders.

d. The Honourable Judge do dismiss the application for taxation filed by Omulele & Tollo Advocates.

e. Cost of this application be provided for.

After hearing the parties, the court (Omollo J) in its ruling delivered on 16th September 2015 allowed the application. Being dissatisfied with the said decision, the respondent herein preferred an appeal, Civil Appeal No.75 of 2015 and in its judgment delivered on 27th May 2016, the Court of Appeal allowed the appeal, set aside the ruling and order of Omollo, J dated 16th September 2015, and in lieu thereof the application dated 12th February 2015 filed in this court were dismissed.

7. In the present application, the applicant is seeking inter alia stay of taxation of the Bill of Costs dated 25th September 2014. It is also seeking an order to strike out the said Bill of costs.

8. The law pertaining to the doctrine of res judicata is captured under the provision of section 7 of the Civil Procedure Act which states:

“No court shall try any suit or issue in which the matter is directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

There is no doubt that the principle applies to applications with the same force whether the application be final or interlocutory.

9. For me to determine if the current application is res judicata, the only two questions that I have to ask myself are; firstly whether the issues which were before this court in the Notice of Motion dated 12th February 2015 and in Civil Appeal No.75 of 2015 are the same as those now raised in the present application; secondly whether there is a final determination on those issues by the previous courts. There is no dispute that the parties are the same in all these proceedings.

10. I have already outlined the prayers sought in the present application as well as those in the Notice of Motion dated 12th February 2015. In both applications, the applicant is seeking stay of taxation of the respondent’s Bill of Costs and seeks to have the same dismissed or struck out. These issues are similar in all forms and this court and the Court of Appeal determined them in the earlier decisions. Even the issue regarding the firm of Omulele & Co. Advocates was fully canvassed and determined.

11. The statutory provision under section 7 of the Civil Procedure Act is clear and bars a court from hearing a suit or issue if the same was substantially in issue in a former suit between the same parties, if the issue was determined in the former suit after a hearing. In this application, the respondents are the applicants just as in the previous application. They have now sought the same reliefs as those they had sought in the former application yet the court (Omollo, J) and the Court of Appeal had already adjudicated on those issues. By virtue of Section 7 of the Civil Procedure Act, this application is barred by the doctrine of res judicata.

12. By reason of the foregoing, I find that the application is an abuse of the court process as it raises issues which had been substantively litigated and adjudicated upon by courts of competent jurisdiction. The same is hereby dismissed with costs. These orders will apply in Miscellaneous Application Number 3/15 and 4/15.

Dated, signed and delivered at Mombasa this 29th day of May 2017.

.....for the applicant

.....for the respondent

C. YANO

JUDGE